

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL LAWYERS GUILD,)	
SAN FRANCISCO BAY AREA)	No. S252445
CHAPTER,)	
Plaintiff and Respondent,)	Court of Appeal
vs.)	No. A149328
)	
CITY OF HAYWARD, et al.,)	Alameda County Superior Court,
)	Case No. RG15-785743
)	(Hon. Evelio Grillo)
Defendants and Appellants.)	
)	

AFTER A DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION THREE

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

ARGUMENT	7
I. The Public Records Act Must be Read as Whole in Order to Provide Context to the Meaning of the Term “Extraction” in Section 6253.9(b)(2)	7
II. California Constitution Article I, Section 3(b) Is Essential to the Interpretation of the Public Records Act, But Hayward, Like the Court of Appeal, Has Not Meaningfully Included this Constitutional Mandate in its Analysis of Section 6253.9(b)(2)	10
III. Dictionary Definitions without Proper Context Provide an Insufficient Basis to Interpret Section 6253.9(b)(2)	11
IV. The Legislative History Relied on by Hayward Does Not Provide Further Definition to the Terms Used in Section 6253.9(b)(2)	19
V. Public Policy Favors Making Records Available to All Persons, Not Only Those Who Can Afford to Pay for Access	32
VI. Nathaniel Roush Performed an Ordinary Search for Records, Not a Compilation Necessary to Produce a Record Within the Meaning of Section 6253.9(b) and 6253.9(b)(2)	35
CONCLUSION	38

TABLE OF AUTHORITIES

Cases

Altaville Drug Store, Inc. v. Employment Development Dept. (1988) 44 Cal. 3d 231	28
American Civil Liberties Union Foundation of Northern California v. Deukmejian (1982) 32 Cal.3d 440	12
American Civil Liberties Union Foundation v. Superior Court (2017) 3 Cal. 5th 1032	10, 15, 33
Ardon v. City of Los Angeles (2016) 62 Cal. App. 4th 1176	33
Association of California Insurance Companies v. Jones (2017) 2 Cal. 5th 376	30
California Teacher’s Association v. San Diego Community College District (1981) 28 Cal. 3d 692	28, 30
CBS Broadcasting Inc. v. Superior Court (2001) 91 Cal.App.4th 892	13
City of San Jose v. Superior Court (2017) 2 Cal.5th 608	10, 15, 19, 33
Commission on Peace Officer Standards and Training (2007) 42 Cal. 4th 278	8
Connell v. Superior Court (1997) 56 Cal. App. 4th 601	12
Conservatorship of Whitley (2010) 50 Cal. 4th 1206	30
Elsner v. Uveges (2004) 34 Cal. 4th 915	30
Fredericks v. Superior Court (2015) 203 Cal.App. 4th 209	13, 37
Green v. Ralee Engineering Co. (1988) 19 Cal.4th 66	33
Ingersoll v. Palmer (1987) 43 Cal. 3d 1321	23
People v. Mendoza (2000) 23 Cal. 4th 896	23
Quintano v. Mercury Casualty Co. (1995) 11 Cal.4th 1049	30
Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal. 4th 920	28, 30

Sander v. Superior Court (2018) 26 Cal. App.5th 651	17, 18
Santa Clara County v. Superior Court (2009) 170 Cal.App.4th 1301	13
Sierra Club v. Superior Court (2013) 57 Cal. 4th 157	7-8, 15, 18, 19, 24, 33, 36

Constitution and Statutes

Cal. Const. Art. I, § 3(b)(1)	10, 34
Cal. Const. Art. I, § 3(b)	7, 10
Cal. Const. Art. I, § 3(b)(2)	10, 11, 19, 34
Gov. Code § 6250	19, 35
Gov. Code § 6252(e)	18
Gov. Code § 6252.2(a)(2)	23
Gov. Code § 6253(a)	9, 11, 17, 32
Gov. Code § 6253(c)(4)	9
Gov. Code § 6253.2	23
Gov. Code § 6253.9	7, 9, 15, 19, 32
Gov. Code § 6253.9(a)	7, 8, 23
Gov. Code § 6253.9(a)(1)	18
Gov. Code § 6253.9(a)(2)	7, 24
Gov. Code § 6253.9(b)	8, 9, 11, 16, 21, 23, 26, 34
Gov. Code § 6253.9(b)(2)	passim
Gov. Code § 6255(a)	14
Stats. 2000, Chapter 982, Assem. Bill 2799	32

Other Authorities

Assem. Bill No. 179 (1997-1998 Reg. Session)	22, 23
Assem. Bill No. 2799 (1999-2000 Reg Session)	passim
Assem. Com. on Governmental Organization, Analysis of Assem. Bill 2799 (1999–2000 Reg. Sess.) as introduced Feb. 28, 2000	20, 24
Assembly Final History, AB 2799	30
Assembly Report Third Reading, AB 2799, as amended May 23, 2000	25
Assembly Republican Caucus, analysis of AB 2799, as amended May 23, 2000	25
City of San Diego letter to Senator Debra Bowen re: SB 1065 (May 17, 1999)	23
County of Los Angeles Sheriff’s Department letter to Assemblyman Herb Wesson re AB 2799, April 21, 2000	24
County of Los Angeles, Assembly floor analysis, AB 2799, May 22, 2000	25
Department of Conservation, Enrolled Bill Report on AB 2799	29
Department of Finance, Bill Analysis, Sen. Bill No. 1065	22
Department of Finance, Enrolled Bill Report on AB 2799	29
Department of Motor Vehicles, Enrolled Bill Report on AB 2799	29
Department of Pesticide Regulation, Enrolled Bill Report on AB 279	29
Enrolled Bill Memorandum to Governor, Assem. Bill 2799 (1999-2000 Reg. Sess.), September 10, 2000	20
General Counsel Thomas W. Newton, Cal. Newspaper Publishers Assn., letter to Governor Gray Davis re AB 2799, Sept. 8, 2000	26, 27, 31
Governor’s veto message to the Assembly on AB 179 (1997-1998 Reg. Session), October 12, 1997	22

Governor's veto message to the Senate on SB 1065 (1999-2000 Reg. Session), October 10, 1999	22
Leg. Counsel's Dig., AB 2799, as amended, June 22, 2000	27
Letter from Violet Varona-Lukens, California Clerk's and Election Officials to Senator Kevin Shelley re AB 2799, June 21, 2000	26
Los Angeles Sheriff's Department letter to Senator Kevin Shelley re AB 2799, April 20, 2000	25
Merriam-Webster (on line) https://www.merriam-webster.com/dictionary/redact (accessed April 18, 2019)	15
Memorandum re AB 2799, Questions and Answers, as of August 23, 2000	30
Miscellaneous Memorandum re AB 2799 (undated)	25
Sen. Bill No. 1065 (1999-2000 Reg. Session)	22, 23
Senate Committee on the Judiciary, Background Information re: AB 2799 (undated)	26

ARGUMENT

Hayward's Answer Brief fails to address many of the textual arguments presented in the Opening Brief on the Merits. As for those arguments it does address, first, Hayward does not have an effective answer to our analysis of the interrelated parts of the Public Records Act as a whole and our discussion of the specific language of Government Code section 6253.9. Second, Hayward asserts that its broad dictionary definition of the term "extraction" is supported by snippets of legislative history. But Hayward's arguments collapse when the statute is read as a whole, when its legislative history contentions are examined, and when the public policy of the State, including Cal. Const. Article I, section 3(b), is considered in construing the relevant statutory language.

I. The Public Records Act Must be Read as Whole in Order to Provide Context to the Meaning of the Term "Extraction" in Section 6253.9(b)(2)

Hayward's analysis is marked by studious avoidance of the following points developed in the Opening Brief on the Merits.

- Government Code section 6253.9(a) says an agency is limited to charging the direct costs of duplication of an electronic record "if the requested *format* is one that has been used by the agency to create copies for its own use or for provision to other agencies." Gov. Code section 6253.9(a)(2) (emphasis added). *See Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 177. Here, the

police videos were in MP4 format when then were uploaded and later retrieved from Evidence.com. The redacted videos were produced to the Lawyers Guild in the same format. Hayward has not given a reason why section 6253.9(a) does not apply to the videos produced in this case. See Opening Brief on the Merits at 35, 37.

- Charges to a requester that exceed duplication are permissible under section 6253.9(b)(2), but all three terms used in that subsection (“compilation, extraction, [and] programming”) are interrelated to signify complex, non-routine processes, that transform machine readable data into a tangible record or format. Hayward has not given a reason why the three critical terms in section 6253.9(b)(2) should not be construed together and defined by one another. See *Sierra Club*, 5 Cal. 5th at 160; *Commission on Peace Officer Standards and Training* (2007) 42 Cal. 4th 278, 294. Opening Brief on the Merits at 35.

- Charges to a requester that exceed duplication are permissible under section 6253.9(b) for the costs of constructing a record when programming and computer services are necessary to produce a copy of the record. The statute says costs may be charged when data compilation, extraction, or programming are necessary to produce a record, not to redact or reduce a record. Hayward has not addressed the central purpose of the key terms: “necessary,” “produce,” and “construct.” Opening Brief on the Merits at 37.

- Agencies must respond to a Public Records Act request within ten days, except that in unusual circumstances the time may be

extended in writing for an additional fourteen days. One specified unusual circumstance is “[t]he need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.” Gov. Code section 6253(c)(4). Although this language was added by the same legislation that added section 6253.9 to the Public Records Act, Hayward has failed to acknowledge that section 6253(c)(4) informs the analysis of the meaning of section 6253.9(b) and 6253.9(b)(2). Opening Brief on the Merits at 38-39.

- A redaction is addressed in the Public Records Act as a “reasonably segregable” portion of a record. Gov. Code section 6253(a). But section 6253.9(b)(2) does not incorporate these terms, or even cross-reference these terms. Instead, as relevant here, section 6253.9(b)(2) uses the term “extraction,” which is not otherwise defined in the Public Records Act. Hayward fails to reconcile the Legislature’s failure to incorporate the segregation requirement found in section 6253(a) – the obligation to separate exempt from nonexempt portions of records – with the Legislature’s use of the term “extraction” in section 6253.9(b)(2). Opening Brief on the Merits at 45-46.

In other words, Hayward has not undermined the textual analysis of the Public Records Act developed in the Opening Brief as it sheds light on the meaning of the terms used in section 6253.9(b)(2).

II. *California Constitution Article I, Section 3(b) Is Essential to the Interpretation of the Public Records Act, But Hayward, Like the Court of Appeal, Has Not Meaningfully Included this Constitutional Mandate in its Analysis of Section 6253.9(b)(2)*

In its Answer Brief, Hayward fails to acknowledge the importance and force of Article I, section 3(b)(2) of the Constitution. This provision is not a mere aspiration. It is an imperative. It has been described by this Court as a “constitutional imperative to construe CPRA in a manner that furthers disclosure.” *American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal. 5th 1032, 1039; *see City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617 (“constitutional imperative”). Hayward mentions the constitutional provision in passing (Answer Brief at 24, 34), but, like the Court of Appeal, it does not give section 3(b) any force or weight. Hayward treats the Constitution as if it were some sort of rote utterance that must be invoked, but has no operative effect. When Hayward does cite the constitutional provision it merely invokes its general provisions protecting the “right of access” and “privacy.” *Id.* at 24, 34. Cal. Const. Art. I, § 3(b)(1). Nowhere does Hayward recognize or address, Art. I. section 3(b)(2) which requires that “A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.”

Without conceding any merit to any of the arguments Hayward presents in other portions of its Answer brief, the imperative imposed on this case by Article I, section 3(b)(2) is that the Court must read section 6253.9(b) in a manner that maximizes public access to police videos by limiting the charges that may be imposed on the public. Should the Court find the Lawyers Guild and Hayward's statutory interpretations equally valid, then section 3(b)(2) is the tie-breaker and the Court must interpret the statute to favor disclosure without the constraints that are imposed by putting a price on access that only wealthy persons and organizations can afford.

III. *Dictionary Definitions without Proper Context Provide an Insufficient Basis to Interpret Section 6253.9(b)(2)*

Hayward characterizes its segregation of exempt portions of the body camera videos sought by the Lawyers Guild as extractions; then it argues the plain language of section 6253.9(b)(2) says it may charge extra for extractions and therefore the "express language of the statute" supports the charges it imposed for copies. Answer Brief at 28; see also, *id.* at 38 ("Here, a plain reading is all that is necessary. The statute says what it means. There is no need to read beyond the contents provided in §6253.9.").

Although the city describes what it did as "extraction," but it could have just as easily described it as "redaction," a term that does not conveniently fit its legal position. Answer Brief at 33. Hayward pivots by arguing that the Public Records Act permits deletions, pursuant to Gov. Code § 6253(a), and that extractions are deletions.

Id. This, too, is non-responsive to our arguments because it fails to shed light on the meaning of the term “extraction.”

Hayward argues that the segregation process with regard to paper records is less burdensome than the segregation process with regard to some electronic records, “whether it involves extracting exempt portions from non-exempt records or non-exempt portions from exempt records.” Answer Brief at 35. But Hayward offers no support or evidence for its proposition that paper records are not as burdensome as some electronic records. Certainly redaction of a large set of paper records, numbering as many as hundreds or thousands of pages, is burdensome. *Cf. American Civil Liberties Union Foundation of Northern California v. Deukmejian* (1982) 32 Cal.3d 440, 452-453; *Connell v. Superior Court* (1997) 56 Cal. App. 4th 601, 615. But an equal number of pages stored electronically may be redacted far more easily using a “search and replace” function or by other forms of electronic identification. Paper records that are burdensome to redact may be far less burdensome to redact in electronic form. Comparing hypothetical burdens imposed by paper and electronic records as a means of giving a legal meaning to the term “extraction” is not helpful or persuasive.

Hayward says that charging requesters additional costs “would serve the interests of both privacy and disclosure,” contending that privacy is somehow advanced and protected by charging for the cost of redacting electronic records. Answer Brief at 36, and 34-36. But protecting privacy is the obligation of an agency, not the

responsibility of the requester. Passing the cost on to a requestor is inconsistent with the scheme of the Act.

Hayward also goes on to make the remarkable statement that agencies might not “willingly and fully” obey their statutory duties if they are not allowed to charge for extractions. Answer Brief at 36; see also *id.* at 51 (“Additional costs equate to additional access.”).

Although there is some support in a court of appeal opinion for a contention that recoupment of costs may mitigate an excessive burden of disclosure (*Fredericks v. Superior Court* (2015) 203 Cal.App. 4th 209, 238)¹ as a policy consideration, the speculative notion that agencies may not make records available due to the burden should be given little weight. Compare *CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 909 (\$43,000 cost of compiling an

¹ *Fredericks* does use the term “redaction” in the context of Gov. Code section 6253.9(b)(2). 233 Cal.App. 4th at 238. But *Fredericks* used the term in the context of the balancing process contemplated by Gov. Code section 6255(a) – whether the public interest in disclosure is clearly outweighed by the interest in non-disclosure. The Court of Appeal indicated that when “generation, compilation and redaction of information from confidential electronic records” is necessary, then additional fees may be allowed if the burden on the agency is unreasonable. In this context the court was specifying a process by which records would first be generated, then compiled, and then the compiled records would be redacted.

Section 6253.9(b)(2) was similarly mentioned in *Santa Clara County v. Superior Court* (2009) 170 Cal.App.4th 1301, 1336-1337, but the scope of the statute was not resolved and the matter was remanded to the Superior Court.

accurate list of names was not “a valid reason to proscribe disclosure of the identity of such individuals.”). But even if Hayward’s assumption is credited, it must be weighed against others – such as the substantial impact redaction charges would have on the ability of the public to access records at all.

Additionally, the argument that charges would mitigate the burden of producing records and make more available, begs the question of why mitigation fees would be needed when an electronic record is redacted, but the burden is small or minimal, such as in connection with the second set of videos produced in this case. Under Hayward’s construction of section 6253.9(b)(2), an agency can charge for additional costs of redacting records so long as they are in electronic form, regardless of the burden imposed by producing redacted records.² As we demonstrated in the Opening Brief this interpretation of section 6253.9(b)(2) is untenable.

In a later section of its brief, Hayward introduces the argument that redaction pertains solely to text based records, while extraction is

² In this case, the Superior Court made an express finding after balancing the asserted burden of redaction against the public’s right to know and found that “[c]onsidering all of the above, the court finds that Hayward did not demonstrate by a preponderance of the evidence that the total costs in staff time and expenses related to producing redacted copies of the police body worn videos “clearly outweighs the public interest served by disclosure of the record [within the meaning of Gov. Code section 6255(a)].” Hayward did not challenge this finding on appeal and has not raised section 6255(a) in its defense.

a much broader term that would include non-textual media. Answer Brief at 63. Hayward draws a distinction between text based records and other forms of electronic data. Answer Brief at 64-65. Hayward cites dictionary definitions of the word redaction to support its contention. But one can find dictionary definitions that show the term redaction is not limited to textual media. *See e.g.*, Merriam-Webster (on line), “redact,”: “to select or adapt (as by obscuring or removing sensitive information) for publication or release.”

<https://www.merriam-webster.com/dictionary/redact> (accessed April 18, 2019). An example of usage given by Merriam-Webster below its definition is: “‘Scenes of victims and first responders performing medical procedures were redacted from the video.’ — Katherine Lam, Fox News, ‘Cincinnati police release bodycam footage of cop firing through window, gunning down mass shooter at bank,’ 13 Sep. 2018.” *Id.*

But even if Hayward is correct and redaction is a term commonly associated with text, the Public Records Act, as this Court has recognized, “should be interpreted in light of modern technological realities.” *American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal. 5th 1032, 1041; *Cf. City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608; *Sierra Club v. Superior Court* (2013) 57 Cal. 4th 157, 167-168. Here the present day reality is that electronic media have become far more prevalent than the universe of text based documents that existed in year 2000 when section 6253.9 was added to the Public Records Act. Hayward’s

contention (Answer Brief at 65)³ that the Legislature contemplated “redaction” for text, and a different word, “extraction” for videos, does not make sense.⁴ The process of removing data from a record, whether it is a text record, video, sound recording, or something else, is still a redaction as that term has been used in countless legal opinions and as used in the Public Records Act. See Opening Brief on the Merits at 39-41.

Hayward challenges the Lawyers Guild to explain “what forms of video ‘extraction’ would fall into its definition.” Answer Brief at 67. The construction we urge this Court to adopt is that extraction means take something out in order to produce or construct something else. This is consistent with the text of Gov. Code section 6253.9(b)(“the requester shall bear the cost of producing a copy of the record, including the cost to *construct* a record, and the cost of programming and computer services necessary to produce a copy of the record”)(emphasis added), and the language of section 6253.9(b)(2)((“The request would require data compilation,

³ Hayward provides no support for its assertion that: “A video requires a broader, more encompassing word. Hence, the legislature adopted a word that allows for the removal of information spanning numerous electronic mediums, and thus, the inclusion of the word ‘extraction,’ as opposed to ‘redaction,’ is appropriate.” Answer Brief at 65.

⁴ At another point Hayward asserts that “extraction” and “redaction” have different meanings, but later says that the two terms are synonymous. Answer Brief at 65, 69.

extraction, or programming to *produce the record*.”). See Opening Brief on the Merits at 41-42.

In the context of text based electronic documents this means a complex, non-routine process of pulling out pages, paragraphs, sentences, words, or combinations to construct or produce a new text which includes the extractions. In the context of video, it would be a complex, non-routine computer process of pulling portions or snippets of a large video, then assembling them in a new presentation of the limited portions extracted. See Opening Brief on the Merits at 26 (“Subsection (b)(2) is limited to extraordinary computer processes necessary to produce a record from a broad set of data.”). For example, a highlights video, reducing a 32 minute public highschool basketball game to two minutes would likely require extraction. A police video showing a gunshot fired at a suspect taken from a longer video covering an entire incident would likely be an extraction. But removing exempt data from an existing video would be a “redaction,” as that term is commonly understood.⁵ Removing exempt data from an existing video deletes the portions that are exempted by law. See Gov. Code § 6253(a)(“Any reasonably segregable portion of a record

⁵ The court of appeal opinion in *Sander v. Superior Court* (2018) 26 Cal. App. 5th 651, 667 is not to the contrary. All *Sander* holds is that an agency cannot be required under the Public Records Act “to create a new record by changing the substantive content of an existing record or replacing existing data with new data.” *Id.* at 669. In any event, *Sanders* is not binding on this court.

shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.”).

For this reason, and for the reasons summarized in Part of I of this reply brief, Hayward’s narrow limitation of the term redaction to text based records is flawed. Hayward admits that the mechanical process of editing a digital video, including importing the files, decompressing and rendering a file, modifying the file, and recompressing and exporting the file, does not constitute the creation of a new record, but is merely a process for creating a redacted duplicate. Answer Brief at 67, citing *Sander v. Superior Court* at 667. Indeed, any redaction of an electronic record will involve a mechanical process in the background necessary to render the redacted record.

Hayward’s distinction between text and other records is especially wrong because the Public Records Act does not differentiate among the endless types of formats in which public records are kept by agencies. *See* Gov. Code section 6252(e)(“Public records’ includes any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”). All formats are public records within the meaning of the Act, without different rules governing their disclosure. “The format of information is not generally determinative of the public record status of government information.” *Sierra Club v. Superior Court*, 57 Cal. 4th at 165. The rules governing disclosure of non-

exempt information in public records do not turn on the format and there is no distinction among records in the Act. *See City of San Jose v. Superior Court*, 2 Cal. at 624 (“unlikely ‘the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in’ a certain type of file.”).

Further, as the California Constitution requires, when there are two competing statutory interpretations, one which favors access and one which limits access, the broader interpretation is necessary to fulfill the intention of the voters and the preamble to the Public Records Act. Cal. Const. Art. I, sec. 3(b)(2); Gov. Code section 6250. *See City of San Jose*, 2 Cal. 5th at 624.

To impose a heavy cost burden on the types of records that are proliferating in the modern era would convert the constitutional imperative for wider access and transparency into an empty promise.

*IV. The Legislative History Relied on by
Hayward Does not Provide Further
Definition to the Terms Used in Section
6253.9(b)(2)*

Following its narrow reading of the term “extraction,” Hayward relies on snippets taken from the legislative history of Assem. Bill No. 2799 (1999-2000 Reg Session)[hereafter AB 2799], the bill that added section 6253.9 to the Public Records Act.

Hayward runs away from the Court’s legislative analysis of AB 2799 in *Sierra Club v. Superior Court*, 57 Cal.4th at 174-175, characterizing it as dicta. Answer Brief at 59. Hayward contends that the Court only read the legislative history in connection with

concerns over staff time to perform redactions and inadvertent disclosure of electronic records. *Id.*

It is true, as Hayward suggests, that this Court did not consider the precise issue that is before this Court now – whether an agency can charge a requestor extra for making redactions to an electronic record. But, the Court did consider the legislative history of AB 2799 and recognized that its purpose was to “to ensure quicker, more useful access to public records.” *Id.* at 174, quoting Assem. Com. on Governmental Organization, Analysis of Assem. Bill 2799 (1999–2000 Reg. Sess.) as introduced Feb. 28, 2000, p. 2. Further, the Court recognized that potentially the significant amount of staff time spent redacting records was a concern of opponents of the bill, but that this concern was in effect in the final bill. *Id.* at 175. Had the legislature said in some form that significant staff time making redactions could be compensated or charged as “extraction” within the meaning of section 6253.9(b)(2), this Court undoubtedly would not have noted that the concern remained in effect through the final

enrolled bill. *Id.*⁶ This is the very same legislative history that Hayward now contends points to a different conclusion.

Hayward’s own legislative history analysis is flawed and inconclusive for three independent reasons. First, the principal documents relied on as indicative of legislative intent are not expressions of the Legislature as a whole, or expressions that the legislators voting on the bill necessarily would have relied on. Second, the language used in the various legislative reports that Hayward contends supports its interpretation of section 6253.9(b) is essentially tautological: the language in the reports simply repeats the language used in the final amended bill, adding no additional definition or interpretive guidance. And, third, the opposition to AB 2799 that Hayward so heavily relies on objected to the costs of “redaction,” the opponents did not use the word “extraction.” In the end, the Legislature allowed for recovery of costs of extracting data to produce a record (§ 6253.9(b)(2)), but said nothing about costs of

⁶ See Enrolled Bill Memorandum to Governor, Assem. Bill 2799 (1999-2000 Reg. Sess.), September 10, 2000, p. 2, at LH 816-817. This Memorandum summarizes the basis for the *unsuccessful* opposition to the bill: “state agencies can be requested to do analyses, write computer programs, and otherwise prepare the information requested. Under this approach private entities can request agencies to compile data in ways that meet the requestor’s needs – an effort that currently is born [sic] by the requestor. The new approach could allow private entities to unilaterally direct the work that is performed by an agency to their benefit and could result in excessive state agency costs.”

redaction. The Legislature never adopted or incorporated the term the objectors used “redaction.”

Hayward begins its argument by saying that two bills that preceded AB 2799 (Assem. Bill No. 179 (1997-1998 Reg. Session)) and Sen. Bill No 1065 (1999-2000 Reg. Session))(LH 1153) failed “for reasons of expense, administrative burdens, and the potential breach of citizen confidentiality.” Answer Brief at 39. Without exploring the text of either bill, or citing to the text, Hayward relies on language in opposition to AB 2799 by Orange County over a year later to say why the bills were never enacted. Answer Brief at 39, n. 7. This is hardly an authoritative summary of either bill or a summary of the reasons both bills were vetoed by two governors.⁷ Hayward additionally cites opposition to SB 1065 to explain why that legislation failed, citing a brief Department of Finance Bill Analysis, Sen. Bill No. 1065 (LH 1254), expressing the view of the Department, which does not include the language of the bill itself. Hayward also cites opposition to SB 1065 by San Diego County for the proposition that SB 1065 failed because the bill would have “‘undercut entire operations’ in addition to ‘escalating costs to

⁷ AB 179 was vetoed by Governor Wilson on October 12, 1997. Governor’s veto message to the Assembly on AB 179 (1997-1998 Reg. Session), October 12, 1997. LH 1137.

SB 1065 was vetoed by Governor Davis on October 10, 1999. Governor’s veto message to the Senate on SB 1065 (1999-2000 Reg. Session), October 10, 1999. LH 1358.

comply.’” City of San Diego letter to Senator Debra Bowen re: SB 1065, May 17, 1999)(LH 1300).

As this Court has recognized many times, it is rarely productive to use the failure of an earlier bill as an indication of legislative intent with respect to a later enacted bill on the same subject. *People v. Mendoza* (2000) 23 Cal. 4th 896, 921 (“the Legislature’s failure to enact a proposed statutory amendment may indicate many things”); *Ingersoll v. Palmer* (1987) 43 Cal. 3d 1321, 1349 (“We can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law.”).

But if Hayward is correct and the opposition to AB 179 and SB 1065 was due to “escalating costs to comply,” and that these concerns inform the analysis of the intent of AB 2799, Hayward fails to explain why AB 2799 as originally introduced did not address these concerns at all. See text of AB 2799, as introduced, February 28, 2000. LH 1. As introduced AB 2799 would have deleted language in Gov. Code section 6253(b), which said “computer data shall be produced in a form determined by the agency,” but the proposed language said nothing about agencies recovering costs in excess of the costs of duplication. LH 3-5. The original version of AB 2799 added a new section 6253.2, which prescribed the forms of electronic records required to be produced.⁸ LH 4. There was nothing in the version of

⁸ This section in substance became what is now section 6253.9(a). Originally, section 6252.2(a)(2) also said “direct costs of
(continued...) ”

AB 2799 to address the basis advanced by Hayward for the failure to enact the two predecessor bills.

In fact, what Hayward heavily relies on in its analysis is opposition voiced against AB 2799 in its earlier forms, rather than indications of what the Legislature actually intended when it passed the final version of the bill, adding the language which is at issue in this case, Gov. Code section 6245.9(b)(2).

Hayward points to an Assembly Committee on Governmental Organization report, for a May 8, 2000 hearing, stating that “some” opponents were concerned that redaction might be costly and might lead to error (the same concern this Court identified in the *Sierra Club* opinion⁹) and that the bill did not include a provision for recovery of costs to prepare a record. Assembly Committee on Governmental Organization, AB 2799, May 8, 2000. LH 40-41. Hayward cites other entities objecting to the bill due to perceived problems redacting electronic records. Answer Brief at 42, citing County of Los Angeles Sheriff’s Department letter to Assemblyman Herb Wesson re AB 2799, April 21, 2000, LH 97 (claiming the bill would prevent agencies from redacting records at all) and County of

⁸(...continued)

duplication shall include the costs associated with duplicating the electronic record.” This sentence was later amended to read: “The costs of duplication shall be limited to the direct costs of producing a copy of a record in an electronic format.” See § 6253.9(a)(2).

⁹ 53 Cal.4th at 174-175.

Los Angeles Sheriff's Department letter to Senator Kevin Shelley re AB 2799, April 20, 2000 LH 231 (same objection); San Bernardino County Sheriff's Department letter to Senator Kevin Shelley, May 3, 2000, LH 153 (stating that the bill did not address the cost of redactions).

Hayward's citation of an Assembly report on the Third Reading of the Bill, as amended May 23, 2000, contains the same objection quoted earlier in the May 8 hearing report. Assembly Report Third Reading, AB 2799, as amended May 23, 2000, LH 163-164, 266.

Hayward cites a Republican bill analysis of AB 2799, a partisan effort that does not represent the views of the Legislature. Assembly Republican Caucus, analysis of AB 2799, as amended May 23, 2000, LH 195-196. Hayward next turns to a Los Angeles County letter submitted in opposition, objecting to the electronic format requirements of disclosure, claiming that they will increase the costs of legal review, redaction, and special programming. County of Los Angeles, Assembly floor analysis, AB 2799, May 22, 2000, LH 230.

Hayward then identifies a meeting held by the author of the bill, attributing to him remarks contained in a question-answer format. Miscellaneous Memorandum re AB 2799 (undated). LH 429. However, the purpose of the question-answer document is unclear. Were these talking points prepared by staff for the author's benefit? Were questions and their answers actually shared with anyone? Were the questions and answers given to the Legislature? It is impossible to say. *Id.*

Hayward next points to an undated memorandum from the bill's author indicating that he might introduce an amendment to the bill addressing the cost and feasibility of redacting public records prior to June 19, 2000. Senate Committee on the Judiciary, Background Information re: AB 2799 (undated). LH 197-198. But the best that Hayward can find in the legislative history to argue that the final version of the bill actually addressed the cost of redaction is a California Newspaper Publishers Association letter to the Governor stating that the bill was amended to address the cost of producing a copy of an electronically held record. General Counsel Thomas W. Newton, Cal. Newspaper Publishers Assn., letter to Gray Davis re AB 2799, Sept. 8, 2000, LH 357-359. But this letter was not even from the author or any other person or committee that was part of California government. The additional citation of a letter from the California Association of Clerks and Election Officials, cited by Hayward, also does not come from anyone associated with the government. Letter from Violet Varona-Lukens, California Clerk's and Election Officials to Senator Kevin Shelley re AB 2799, June 21, 2000, LH 211.

What is clear from the timing and amendments to AB 2799 is that the bill was amended to add section 6253.9(b), but the Legislature never used the same language presented by the objectors in their opposition ("redaction"), and instead adopted language clearly meant to address certain types of costs, without addressing the

meaning of the terms used in the language of the amendment – “data compilation, extraction, or programming to produce the record.”

Hayward’s Answer Brief at 45 says that the new “language was understood to provide that ‘the requester bear the cost of programming and computer services necessary to produce a record not otherwise readily produced’[.]” However, Hayward’s Brief critically leaves out an important part of the sentence quoted from the Legislative Counsel’s Digest of AB 2799. The actual sentence used by the Legislative Counsel says that “the requester bear the cost of programming and computer services necessary to produce a record not otherwise readily produced, *“as specified.”* Leg. Counsel’s Dig., AB 2799, as amended, June 22, 2000, LH 17 (emphasis added). *See also* Leg. Counsel’s Dig., Chapter 982, AB 2799, LH 28. “As specified” obviously refers to the text of section 6253.9(b)(2); it puts a qualifier on the extent to which agencies may charge beyond the cost of duplication. The actual language is not open ended, as Hayward contends, but defined within the bill itself without any further specificity.

To the extent Hayward contends its view is confirmed, it relies again on a statement in the same California Newspaper Publishers Association letter to the Governor, as an indication of legislative meaning. Newton letter to Gray Davis re AB 2799, September 8, 2000, LH 358. Answer Brief at 45-46). Letters from outside parties do not show legislative intent. *Altaville Drug Store, Inc. v.*

Employment Development Dept. (1988) 44 Cal. 3d 231, 238;¹⁰
California Teacher's Association v. San Diego Community College District (1981) 28 Cal. 3d 692, 699-701.¹¹ And statements of authors of legislation and other individual members of the Legislature do not show legislative intent. *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, 931.

Similarly Hayward relies on broad statements of state agencies found in enrolled bill reports (Answer Brief at 46-47), including the Department of Motor Vehicles, which stated that the bill would have

¹⁰ Hayward attempts to distinguish *Altaville* on its facts. Answer Brief at 53. However, what Hayward ignores is this Court's unambiguous holding that letters submitted to a chairman of a committee reviewing amendments to proposed legislation "do not constitute evidence of legislative intent." 44 Cal. 3d at 238, n. 3.

¹¹ Hayward does not contend the rule of the *California Teachers Association* opinion does not apply here. Answer Brief at 54. It contends that a legislator's statement is entitled to consideration as a chronicle of events leading to adoption of an amendment. But that is not what Hayward is arguing. It is arguing that statements in a letter from the California Newspaper Publishers Association are substantive evidence of what the Legislature intended. Answering Brief at 45-46.

To the extent Hayward relies on words it attributes to the author of the bill, it falls short. Twice it references "question and answer" documents whose provenance is unclear at best. Additionally, there is no showing that these question and answer documents were viewed by the Legislature. Answer Brief at 55, citing questions and answers at LH 347 and LH 429. At most, the answers indicate the author would be meeting with opponents of the bill to listen to their concerns.

no effect on it one way or the other because existing law specific to the DMV allowed it to collect administrative fees for producing public records. To the extent the DMV summarized AB 2799 in its report, the agency merely reiterated the terms of the bill without further interpretation. Department of Motor Vehicles, Enrolled Bill Report on AB 2799, LH 832. The Department of Pesticide Regulation report (cited in the Answer Brief at 46) merely states that requesters will “pay for programming time.” It recognizes that data fields may be deleted from electronic formats, but that data manipulation will require more work. Department of Pesticide Regulation, Enrolled Bill Report on AB 2799, LH 841-842. The Department of Conservation (Answer Brief at 47) read AB 2799 very broadly to allow recovery of “costs associated with providing electronic formats of records.” Department of Conservation, Enrolled Bill Report on AB 2799, LH 860. Similarly, the Department of Finance (Answer Brief at 47) read the bill broadly to cover “any costs” resulting from the bill to be paid “by the requester.” Department of Finance, Enrolled Bill Report on AB 2799, LH 900. The reports of the Departments of Conservation and Finance therefore read the bill to give section 6253.9(b)(2) the broadest possible reading unmoored by the meaning of the terms used.

The enrolled bill reports selected by Hayward illustrate the unreliability of using enrolled bill reports – prepared by agencies that did not vote on the legislation and which prepared the reports after passage – to discern legislative intent. Previously, this Court has

sometimes found them to be “instructive,” but they are not given “great weight.” *Elsner v. Uveges* (2004) 34 Cal. 4th 915, 934 n. 19. “An enrolled bill report cannot prevail over ‘more direct windows into legislative intent,’ such as a committee analysis of the bill.” *Association of California Insurance Companies v. Jones* (2017) 2 Cal. 5th 376, 396, quoting *Conservatorship of Whitley* (2010) 50 Cal. 4th 1206, 1218, n. 3. Most importantly, none of the cited enrolled bill reports provide a definition or interpretation of the word “extraction.”

Hayward claims any ambiguity was cleared up by the bill’s author (Answer Brief at 50), in the form of more questions and answers. Memorandum re AB 2799, Questions and Answers, as of August 23, 2000, LH 486-487. But, as we said previously in this brief, there is no context provided for this document. Like the document cited earlier by Hayward (LH 429) it is impossible to know whether it was given to anyone or anyone ever read it, let alone the Legislature on whole. In addition, the document was apparently prepared after August 23, 2000. See LH 486. This is after AB 2799 was amended in July, 2000 and before the third reading. See Assembly Final History, AB 2799, LH 33.

In any event, Authors’ statements are not representative of the Legislature as a whole and therefore are not considered in determining the intent of the Legislature. *Ross*, 42 Cal. 4th 920; *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062; *California Teachers Association*, 28 Cal. 3d at 699-700.

Hayward cites the California Newspaper Publishers Association letter a third time. Answer Brief at 51, citing Newton letter to Gray Davis re AB 2799, September 8, 2000, LH 358.¹² Hayward's heavy reliance on statements in that letter from an outside party belie the lack of any persuasive evidence that the Legislature itself intended to allow agencies to charge for redaction of exempt information from a nonexempt record.

Hayward's contention that the legislative history of AB 2799 "closes the door to any colorable debate as to the meaning of the statute" (Answer Brief at 51), is therefore grossly exaggerated and not supported by the documentation in the record. The legislative history certainly does not provide an interpretation of the term "redaction," a word that could have been easily included in the final amendments to AB 2799. Indeed, to the extent opponents objected to the potential costs of redaction, the Legislature could have addressed this perceived problem head on and used the word "redaction" when it amended AB 2799 to allow costs as specified in section 6253.9(b)(2). Or it could have cross-referenced to the "segregation" requirement in

¹² See Answer Brief at pp. 46, 51, 57.

section 6253(a).¹³ Instead, the Legislature used the term “extraction,” which the legislative history also does not discuss or address.

Finally, Hayward concludes its discussion of legislative history by pointing, as it must, to the actual language of section 6253.9(b)(2) arguing that nearly all critics of the bill withdrew their opposition as a result. Answer Brief at 48. But this, too, begs the question because it simply refers to the actual language of the final legislation rather than anything clarifying the term “extraction,” or indicating that extraction equals redaction within the meaning of the statute.

V. *Public Policy Favors Making Records
Available to All Persons, Not Only Those
Who Can Afford to Pay for Access*

The more money the public is charged for access to public records, the less likely the public will have ready access to the records. They will become unaffordable.

The effect that Hayward’s interpretation of the statute would have on public access to electronic records is an important factor that must be weighed in the course of interpreting section 6253.9. In addition to the text of the statute, the statutory purpose, and the

¹³ The term “redaction” was certainly within the view of the author of the July amendments to AB 2799. In fact, he indicated to the Senate Committee on the Judiciary that “amendments may be introduced to address the issue of the cost and feasibility of redacting public information.” LH 198. Instead, the terms used were “data compilation, extraction, or programming to produce the record.” Stats. 2000, Chapter 982, Assem. Bill 2799 (Gov. Code section 6253.9(b)(2)).

legislative history, if any, a court must look to public policy to discern the true meaning of a provision of the Public Records Act. See *City of San Jose v. Superior Court*, 2 Cal. 5th at 616-617, 625-627; *Ardon v. City of Los Angeles* (2016) 62 Cal. App. 4th 1176, 1184; *Sierra Club v. Superior Court*, 54 Cal. 4th at 166. Here, the policy is made explicit by the California Constitution, the preamble to the Public Records Act, the clear intent of the legislature “to ensure quicker, more useful access to public records,” *Sierra Club*, at 174, and by recent decisions of this Court assuring that access to public records is as broad as possible. *E.g.*, *American Civil Liberties Union Foundation v. Superior Court*, *supra*; *City of San Jose*, *supra*; *Sierra Club v. Superior Court*, *supra*.¹⁴

Hayward downplays the effect its interpretation would have on access to electronic records and video records in particular. It contends that greater access will be provided because requesters will be made to pay for it. Answer Brief at 51 (“No request can be considered unduly burdensome with proper recoupment of agency costs. Additional costs equate to additional access.”). But Hayward’s formulation turns access on its head. It utterly fails to recognize that access quickly becomes unaffordable as access charges increase. As

¹⁴ Hayward cites *Green v. Ralee Engineering Co.* (1988) 19 Cal.4th 66, 71-72 for the proposition that the Legislature not the courts set public policy. Answer Brief at 22. *Green* does not support its position in this case because public policy is established by the State Constitution, the preamble to Public Records Act, and other statutory provisions, as interpreted by this Court.

we pointed out in the opening brief “[a]n interpretation of section 6253.9(b)(2) that permits an agency to charge labor costs whenever it segregates exempt information from existing non-exempt electronic records, would increase the cost of access to public records merely because they are kept in electronic form.” Opening Brief on the Merits at 59.

Hayward readily concedes that “[t]here is no question that public disclosure of body-camera video is important[,] and “[p]ublic viewing of body-camera video is essential[.]” Answer Brief at 8, 71. But what it fails to recognize is that when agencies impose fees for redacting electronic records, such as the body camera videos in this case, access will be out of reach for all except wealthy individuals and organizations. Although paper records will remain available for the direct cost of duplication regardless whether they must be redacted (Gov. Code §6253(b)), electronic records that are subject to redaction will incur costs that seriously undermine the constitutional entitlement giving [“t]he people . . . the right of access to information concerning the conduct of the people's business,” and the constitutional requirement that a statute “shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.” Cal. Const. Art. I, § 3(b)(1) and (b)(2).

Because electronic records are by definition the product of computer programming, including word processing software, portable electronic document (pdf) applications, and the like, as well as digitized photos and videos, all electronic records that require any

redaction will incur costs beyond the costs of duplication. To ignore how such cost bills will put information in electronic form, including police videos, beyond the financial reach of individuals and groups is both disingenuous and callous. If the Public Records Act is to fulfill its goal of keeping California government open and transparent, cost should not be the determining factor in whether agency records are obtainable or not.

It would be anomalous if legislation designed to increase access to public records in the electronic age in fact has the effect of shutting out most members of the public because they cannot afford the price of access. Hayward offers no way to reconcile the significant effect that the interpretation of the Court of Appeal and its own interpretation of section 6253.9(b)(2) would have on the “fundamental and necessary right of every person in this state” to “information concerning the people’s business.” Gov. Code section 6250.

V. *Nathaniel Roush Performed an Ordinary Search for Records, Not a Compilation Necessary to Produce a Record Within the Meaning of Section 6253.9(b) and 6253.9(b)(2)*

Hayward contends that it properly charged for the 4.9 hours of Nathaniel Roush’s time in searching for responsive police videos. Answer Brief at 28. It relies on another term found in section 6253.9(b)(2): “data compilation.”

Roush only located the responsive videos by performing a search. He was given “a list of ‘cases, incidents, and keywords’” which he used for his search. JA 24.8. He performed 45 searches and found 141 videos. JA 50. Roush estimated it took him about ten seconds per search and about one minute 45 seconds to verify the content of each video retrieved. JA 50-51. He then turned the videos over to police department employee Adam Perez for further review. JA 49-52.

But Roush’s work was no different than any other Public Records Act search, except he queried electronic records. Except for the electronic aspect of the search, this is little different than looking for responsive records, in an index, a table of contents, a catalog, or other means of identifying the components. In fact, his search likely took far less time than if he had had to look up the videos in a paper based index system.

The term “compilation” in section 6253.9(b)(2), like the word “extraction,” takes its meaning from the words that accompany it in the series of words used. Section 6253.9(b)(2) allows recovery of labor costs when “The request would require data compilation, extraction, or programming to produce the record.” *See Sierra Club v. Superior Court*, 54 Cal.4th at 169; Opening Brief on the Merits at 35-36. Like the term “extraction,” “data compilation” means a complex computer process of taking data and assembling it into a new form. See Opening Brief on the Merits at 26.

Hayward cites *Fredericks v. Superior Court* (2015)) 233 Cal.App.4th 209 in support of its position. *Fredericks* addressed the scope of disclosure of non-exempt information generated from otherwise exempt records after a “complicated, time consuming review, redaction, and production process to arrange for the release of nonexempt information,” of police calls for service and incident history reports. *Id.* at 235. It applied the Gov. Code section 6255(a) balancing test to the scope of required disclosure, finding that release of additional records would require six full weeks of full time work. *Id.* at 221. The court said that additional costs *may* be charged pursuant to § 6253.9(b)(2) if production of newly constructed records would “require generation, compilation and redaction of information *from* confidential electronic records.” *Fredericks*, at 238 (emphasis added).¹⁵ It remanded the determination of the reasonableness of any fiscal burden on the agency to the trial court. *Fredericks*, therefore, does not support Hayward’s position that a simple search for responsive records is a compilation within the meaning of section 6253.9(b).

For these reasons, Roush’s work in searching for videos cannot be charged under the terms of Gov. Code section 6253.9(b)(2).

¹⁵ To the extent that dicta regarding the cost of redaction is inconsistent with the Court’s opinion in this case, *Fredericks*’ dicta should be disapproved.

CONCLUSION

The judgment of the Court of Appeal should be reversed with directions to affirm the judgment of the Superior Court.

Dated: May 1, 2019

Respectfully submitted,
by:

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San Francisco Bay Area Chapter

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of the foregoing Respondent's Reply Brief on the Merits consists of 7,885 words as counted by the Corel WordPerfect X8 word-processing program used to generate the brief.

Dated: May 1, 2019

/s/
Amitai Schwartz
Attorney for Respondent

PROOF OF SERVICE BY MAIL

Re: *National Lawyers Guild, San Francisco Bay Area Chapter v.
City of Hayward, et al.*, California Supreme Court, No.
S252445

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the

Respondent's Reply Brief on the Merits

on the following, by placing a copy in an envelope addressed to the party listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid at Emeryville, California, on May 1, 2019.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 1, 2019.

Amitai Schwartz

